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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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Petitioner, Norfolk and Western Railway Company, respectfully prays that the Court grant a rehearing of the above-entitled cause. Rehearing is urgently required to permit a majority of a fully-constituted Court to consider and resolve the important issues raised by this case. Rehearing is also required to provide a resolution of the issue concerning the necessity of exhausting the arbitration provisions contained in a collective bargaining agreement. Although certiorari was granted with respect to this issue, the Court's opinion fails to discuss or resolve this important question. Moreover, this Court's interpretation of Section 5(2)(f) of the Interstate Commerce Act clearly

requires review of the pre-merger agreement by the Interstate Commerce Commission and a determination as to whether the protection thus provided is fair and equitable under all circumstances. Since it is clear that the Commission did not perform that task in this case, disposition of this litigation in accordance with the present opinion of the Court requires supplementary proceedings before that agency rather than a continuation of the present enforcement action.

I. REHEARING SHOULD BE GRANTED TO PERMIT A MAJORITY OF A FULLY-CONSTITUTED COURT TO RESOLVE THE IMPORTANT ISSUES RAISED BY THIS CASE.

This case raises important and crucial issues concerning the scope of the Interstate Commerce Commission's obligations under Section 5(2)(f) of the Interstate Commerce Act and the effect of a Commission order approving a rail consolidation upon prior and subsequent collective bargaining agreements. As the United States and the Interstate Commerce Commission stated in their amicus brief filed in this Court, the Commission has proceeded on the basis of a particular interpretation of the Statute "ever since the enactment of Section 5(2)(f) in 1940" (Amicus Brief, p. 28). It is this administrative interpretation, established and followed for more than 30 years, that the majority opinion finds to be inappropriate and contrary to the provisions of the Interstate Commerce Act. Since this statutory provision is central to the Commission's role in railroad consolidation proceedings and impinges on a multitude of collective bargaining agreements involving such consolidations, destruction of the established interpretation entails a potential for developments of a most disruptive and pervasive character. We respectfully suggest that such a decision

should not be made by less than a majority of a fully-constituted Court.

In the present case, a rehearing would permit a fully-constituted Court to participate in the decision and would thus eliminate the uncertainty inherent in a 4 to 3 decision with two vacancies in the process of being filled. The Court has frequently recognized the undesirability of deciding a case by a vote of less than a majority of a full Court and has sought to avoid such a result. The recent removal of certain cases from the calendar, to permit later consideration by a fully-constituted Court, illustrates this approach.

In the past, the Court has frequently used the rehearing process where a lower court decision has been affirmed by a 4 to 4 vote and where it appeared likely that upon reargument a majority decision would ensue. *United States* v. *One 1936 Model Ford V-8,* 305 U.S. 564, 666; *Toucey* v. *New York Life Ins. Co.,* 313 U.S. 538, 596; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 313 U.S. 541, 596; *Baltimore & Ohio R. Co.* v. *Kepner,* 313 U.S. 542, 597; *New York, C. & St. L. R. Co.* v. *Frank,* 313 U.S. 538, 596; *Bruces Juices, Inc.* v. *American Can Co.,* 327 U.S. 758, 812; *MacGregor* v. *Westinghouse Co.,* 327 U.S. 758, 812. This has been particularly true when a newly-appointed Justice became available to make a majority decision possible. *Indian Towing Co.* v. *United States,* 349 U.S. 902, 926; *Ryan Co.* v. *Pan-Atlantic Corp.,* 349 U.S. 901, 926; *Gray* v. *Powell,* 312 U.S. 666, 313 U.S. 596; *Halliburton Co.* v. *Walker,* 326 U.S. 696, 327 U.S. 812.

The uncertainty arising from a 4 to 4 affirmance is no greater than the uncertainty which arises from a 4 to 3 decision reached by the Court shortly before two vacancies are filled. In both cases, the continued validity of the decision is dependent on the unknown views of the new Justices. The tenuous nature of a 4 to 3 decision in such a situation

is demonstrated by *Hust* v. *Moore-McCormack Line,* 328 U.S. 707 (1946), decided by a 4 to 3 vote at a time when two vacancies existed on the Court. Although a rehearing was denied (329 U.S. 674), subsequently, in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (1949), two new Justices joined with the three original dissenters to overrule *Hust.* The four Justices who comprised the "majority" in the original case dissented. Clearly, such a result should be avoided where possible and can be avoided in this case by granting a rehearing.

In the present case, a decision by less than a majority of a full Court is particularly undesirable because it may result in a substantial amount of unnecessary and avoidable litigation and industrial strife. Many pre-merger employee protective agreements have been negotiated and are currently in effect. In the typical situation, the protection provided by these agreements is stated in broad and general terms, to be implemented by later agreements as post-merger problems arise. Numerous implementing agreements are consequently negotiated on an ad hoc basis after consummation of the merger. Even in those instances in which there is no pre-merger agreement, it is customary to enter into subsequent agreements to resolve the many post-merger problems which arise. All of these agreements have been reached through the traditional give and take of the collective bargaining process, premised on the normal authority of the collective bargaining representative to bind all members of the represented class or craft. The decision in this case, however, invites individual employees, not entirely satisfied with the terms agreed upon by their representatives, to seek to overturn such agreements.

It must be emphasized that controversies of this kind affect the complaining individuals, the carrier, the directly-involved collective bargaining representative, as well as other unions which may have signed the same or identical agreements. Moreover, invalidation of a post-merger agree-

ment may adversely affect a large number of employees who do not share the views of the complaining individuals. Because of their nature and broad ramifications, these controversies may very well result in extensive litigation and industrial strife. Results of this kind, we submit, should not be occasioned by a decision of this Court on a 4 to 3 basis when a rehearing would permit examination of the issues and a decision by a majority of a fully-constituted Court.

Moreover, this Court's resolution of the issues presented by this case will have a most immediate and controlling effect on many irreversible decisions with important consequences for the indefinite future. The desirability of future transactions requiring Commission approval under Section 5(2) and the content of prospective collective bargaining agreements will be most directly influenced. Under these circumstances, a consistent and enduring interpretation of the applicable law is required. This objective can be furthered by granting a rehearing in this case.

II. THE OPINION OF THE COURT FAILS TO DISCUSS OR RESOLVE ONE OF THE TWO ISSUES ON WHICH CERTIORARI WAS GRANTED.

One of the questions as to which the Petition for Certiorari was granted concerned the necessity of exhausting the arbitration provision contained in the pre-merger agreement. The Court's decision that the pre-merger agreement must be a part of the Commission's order approving the merger does not resolve this question since, under this theory, the Commission's order must also include the arbitration provision of the agreement. Thus, it must be assumed that the Commission decided that the "fair and equitable" means for resolving disputes over the interpretation of its order was through the arbitration process contained in that order. In the present case, the District Court resolved a dispute

over the interpretation of the order although the arbitration process had not been exhausted. The Norfolk and Western moved to dismiss the complaint on this ground, and this defense was rejected by the District Court (A. (I) 33-35). The same issue was raised, argued and decided in the Court of Appeals (A. (II) 192). The propriety of the Court of Appeals' decision on this point was one of the two questions presented by the Petition for Certiorari (Pet., pp. 22-30). It was briefed by both petitioner (Brief, pp. 53-62) and respondents (Brief, pp. 87-98). The Court's opinion, however, fails to mention this issue. The courts below held that respondents were not bound by the arbitration provision even though the failure to exhaust arbitration was the result of a good faith determination by respondents' collective bargaining representative that respondents claim was without merit. This holding is contrary to this Court's decision on the same issue in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and in conflict with the decision of the 8th Circuit in *Bonnot* v. *Congress of Independent Unions, Local No 14,* 331 F.2d 355 (8th Cir. 1964), as the court below acknowledged (A. (II) 191). The present decision leaves this conflict unresolved.

The Court's decision that pre-merger agreements are converted into Commission orders by approval of the merger and are thus enforceable in federal court makes it vitally important to determine the efficacy of arbitration provisions. Arbitration clauses have been a standard feature of the many pre-merger agreements entered into since 1940. In the absence of pre-merger agreements, the Commission has uniformly prescribed protective conditions which contain arbitration clauses. Thus, in every future case seeking enforcement of a Commission order for the protection of employees, questions will inevitably arise as to the necessity of exhausting the prescribed arbitration procedure. This important issue is presented by this case and should be resolved by the Court.

III. THE MAJORITY OPINION DOES NOT DEAL ADEQUATELY WITH THE ISSUES PRESENTED BY THIS CASE.

Although we do not intend to reargue the merits of the case in this petition, we wish to comment briefly on portions of the majority opinion which reflect a failure to deal with the questions presented by this case.

In its discussion of the pre-merger agreement, the Court states that "By its terms, petitioner agreed to employ all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment . . .*" (Slip Opinion, p. 1). The Court goes on to state that "Some 96 Sandusky Line employees elected to accept employment with petitioner on the terms and conditions stated" (Slip Opinion, p. 2). The Court's quotation, however, is not from the portion of the agreement applicable to the Sandusky Line but from the Examiner's general characterization of the entire agreement in his recommended report and order to the Interstate Commerce Commission. Obviously, the Pennsylvania Railroad employees who elected employment with the N & W on the Sandusky Line did not do so in reliance on the Examiner's report. What these employees did rely on is the language of Section 3 of the pre-merger agreement.* This section of the agreement, as respondents

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* The form distributed to employees to record their election to remain with the Pennsylvania or to become N & W employees included a verbatim reproduction of Section 3 of the 1962 agreement (A. (I) 153-59). That section provides that:

> "None of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." (A. (I) 67).

have admitted, was designed to meet the specific circumstances of the Sandusky Line employees and to encourage a proper allocation of employees to meet the needs of the Pennsylvania on the Toledo Division and the requirements of the N & W on the Sandusky Line. Other employees of "the lines involved" (the Wabash and Nickel Plate railroads) were covered by Sections 1 and 2 of the agreement. Obviously, the Examiner's single sentence characterization of the protection afforded by the agreement could not possibly describe, with any degree of accuracy, the specially-designed protection afforded to the Sandusky Line employees under Section 3 of the agreement as contrasted with the protection afforded the vast majority of involved employees under Sections 1 and 2. To regard this general description as a definitive statement of the protection applicable to respondents is unwarranted.

The Court states that (Slip Opinion, p. 5):

> "When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of Sec. 5(2)(f) is not, as suggested, read out of the Act."

It is difficult to understand the assumption that the Commission in this case adopted or approved the 1962 agreement in view of that agency's explicit statement that it did not do so (Amicus Brief, p. 30) and that this has been its consistent practice for the past thirty years (Amicus Brief, pp. 27-30). Moreover, the Court does not comment on the efficacy of the last sentence of Section 5(2)(f) in the situation where there is a collective agreement but the Commission, rejecting the terms agreed upon by the parties, decides to prescribe other and different protection. This is the result which the last sentence of Section 5(2)(f) was intended to prevent and which the Court's decision now authorizes despite this sentence.

The Court's view that "the significance of the last sentence is that it provides machinery for the terms of a pre-merger collective agreement" (Slip Opinion, p. 5) ignores the fact that the machinery for reaching collective agreements is contained in the Railway Labor Act. The provisions of that Act were utilized prior to the passage of Section 5(2)(f) in negotiating the Washington Job Protection Agreement of 1936 which fixed protective benefits for railway workers affected by railway mergers. The last sentence of Section 5(2)(f) was not necessary to, and did not, create the machinery for an agreement, but was enacted to prevent the Commission from interfering with an agreement resulting from the procedures of the Railway Labor Act.

The Court dismisses the conclusion of respondents' collective bargaining representative, the Brotherhood of Railroad Trainmen, that the 1965 agreement did not abrogate rights created by the pre-merger agreement as being based "on a mistaken view of the law" (Slip Opinion, p. 7). The union's position, however, was not based on any view of the law, but simply on its recognition that the pre-merger agreement which it negotiated with the N & W was not intended to provide the benefits which respondents sought. Had the union realized that a Court might subsequently interpret the agreement without regard to the intention of the parties and substitute different criteria of appropriate protection, it might have refused to honor its agreement with the N & W. This circumstance does not alter the fact that the union, in good faith, interpreted the agreement which it had negotiated as not providing the benefits respondents sought. It does, however, demonstrate the serious adverse effect which the Court's decision will have on stability of labor relations.

IV. THIS CASE SHOULD BE DISMISSED WITHOUT PREJUDICE TO THE INITIATION BY RESPONDENTS OF SUPPLEMENTARY PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

The basic conclusion reached by the majority in this case is that Section 5(2)(f) requires the Commission to review pre-merger agreements and to determine whether the protection thus provided is fair and equitable under all the circumstances. This conclusion must be predicated on the view that Congress intended that the carriers provide and the employees receive only that protection which the Commission affirmatively decides to prescribe after such a review. It is abundantly clear that the Commission did not perform that function in this case. The United States and the Commission have expressly represented to this Court that "the Commission did not review the agreement in this case under Section 5(2)(f), and . . . it had no responsibility to do so" (Amicus Brief, p. 12). Reverting to this matter, the United States and the Commission state:

> "In the instant case, the Commission's statement that no conditions were necessary, 324 I.C.C. at 50, 106, meant only that its duty to protect employees under Section 5(2)(f) had been satisfied by the 1962 agreement. *The Commission did not review that agreement in light of Section 5(2)(f)* and did not adopt it." (Amicus Brief, p. 30, emphasis added)

The Court's judgment, authorizing enforcement of a pre-merger agreement which has not been reviewed by the Commission, is thus clearly inconsistent with the Court's view of the statutory allocation of responsibility for employee protection. In the circumstances of this case, the Court's statutory interpretation requires dismissal of the respondents' enforcement action, without prejudice to the initiation of supplementary proceedings before the Commission under Section 5(9) of the Act to obtain the Commission review found to be required and an administrative order prescribing protection in light of that review.

Conclusion

For the foregoing reasons, this Petition for Rehearing should be granted.

Respectfully submitted,

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December, 1971

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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